YAYASAN HASANAH v. MOHD NIZAM MOHD NASIR & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG JC
[SUIT NO: WA-22NCC-249-05-2021]
7 JANUARY 2023

Abstract – *A buyer in a sale of goods transaction is entitled to, at once, treat a contract as at an end if the goods delivered by the seller clearly do not meet the agreed specifications and/or are not of merchantable quality and/or are not fit for the purposes of the sale. This goes down to the root of the contract and the buyer is under no obligation to wait to see what may happen. He may immediately cancel the contract and rid himself of the difficulty.*

CONTRACT: *Breach – Sale of goods – Damages – Claim for – Purchase of goods based on representations made by seller – Specifications of goods spelled out in purchase orders/invoices – Substantial amount of goods delivered had defects and did not meet specifications agreed between parties – Buyer terminated contract – Whether seller in breach of contract – Whether there was misrepresentation – Whether buyer accepted goods delivered – Whether buyer entitled to terminate contract and claim for damages – Whether seller unjustly enriched – Sale of Goods Act 1957, ss. 4(1), 15 & 16*

TORT: *Misrepresentation – Sale of goods – Purchase of goods based on representations made by seller – Specifications of goods spelt out in purchase orders/invoices – Substantial amount of goods delivered had defects and did not meet specifications agreed between parties – Buyer terminated contract – Whether director of seller company personally liable for tort of deceit and/or fraudulent misrepresentation – Measure of damages*

The first defendant ('D1') was the Managing Director and Chief Executive Officer of the second defendant ('D2'), a company which offered services related to information and communication technology management, system application and products management and project management. The Minister of Finance, in Budget 2021, had introduced an initiative known as Tabung Cerdik ('CERDIK') with its main purpose of providing support through free laptops and dongle internet ('devices') to the most marginalised students and/or to students who could not afford electronic devices for online lessons/learning during the Movement Control Order ('MCO') arising from the outbreak of the COVID-19 pandemic. The plaintiff was appointed as the secretariat of CERDIK. Based on D2's quotations submitted to the plaintiff, the plaintiff issued purchase orders: (i) to purchase 2,500 laptops at the price of RM1,246/unit; (ii) to top up a lump sum of RM150,000 to

upgrade all 2,500 laptops to Core i5 laptop; and (iii) to purchase 2,500 units of dongle internet at the price of RM220/unit ('purchase orders'). In cl. 4 of the purchase orders, the plaintiff reserved its right to reject goods that were not in good order or condition. D2 then issued invoices to the plaintiff and based on the purchase orders and invoices, a contract for sale was concluded between the plaintiff and D2. The plaintiff paid a total sum of RM3,239,681.30 in three tranches under the contract and 1,011 laptops were delivered to four Pejabat Pendidikan Daerah ('PPD'). The respective PPDs performed a detailed examination on the 1,011 units of delivered laptops and found that they did not conform with the specifications stated in the purchase orders and/or invoices as a substantial number of laptops (approximately 966) turned out to be defective, namely: (i) most of the laptops were old, refurbished laptops; (ii) there were no and/or pirated operating system ('OS') in most of the laptops; (iii) there were hard disks without brackets; (iv) there were cracks on the surface and/or brackets of the screen of the laptops; (v) there were power cords which were not in compliance with Malaysian specifications; (vi) there were no/and or faulty webcam on some of the laptops; and (vii) there were incompatible adapters and faulty touchpads, batteries and chargers with some of the laptops. The plaintiff terminated the contract. The plaintiff submitted that D1 had made, amongst others, the following representations to the plaintiff: (i) that D1 and/or D2 had access to ready stocks of unused laptops that were sufficient for the supply to the plaintiff for the CERDIK initiative; (ii) that D2 was able to supply 2,500 units of unused laptops that met the specifications under the CERDIK initiative; and (iii) D1 had demonstrated a sample laptop which appeared to be in good working condition and did not contain any defects. Relying on the said representations by D1 and in view of the urgent need of the devices, the plaintiff decided to contract with D2 for the supply of devices under the CERDIK initiative. Hence, this action by the plaintiff for the sum of RM3,239,681.30 and storage charges, costs of the replacement of the defective laptops in the sum of RM3,439,000, alternatively, damages against (i) D1 for the tort of deceit and misrepresentation; and (ii) D2 for breach of contract and unjust enrichment. On the other hand, D2 counterclaimed for storage charges of the 1,489 undelivered laptops. The issues that arose were: (i) whether D2 was in breach of contract; (ii) whether the plaintiff had accepted the 1,011 units of laptops which were delivered; (iii) whether the plaintiff was entitled to terminate the contract and claim for damages; (iv) whether D2 was unjustly enriched; (v) whether D1 was personally liable for the tort of deceit and/or fraudulent misrepresentation and if so, what was the measure of damages; and (vi) whether D2 was entitled to the counterclaim.

Held (allowing claim; dismissing counterclaim):

(1) The contract was a contract for the sale of goods within the meaning of s. 4(1) of the Sale of Goods Act 1957 ('SOGA') as it was a contract whereby the seller (D2) agreed to transfer the property in the goods (devices) to the buyer (the plaintiff) for a price. In this case, the devices being purchased as stated in the purchase orders were Fujitsu/Asus/Lenovo (mixed) laptops which were further described as devices with Windows 10 OS, ram size: 8GB, hard drive capacity: 256GB SSD, processor type: Intel Core i3, no. of CPU cores: dual core, built-in Wi-FI and inclusive of laptop bag. There was, therefore, the implied condition that the goods to be supplied under the purchase orders must comply with that description within the meaning of ss. 15 and 16 of the SOGA. The devices delivered by D2 to the plaintiff had to match those specifications in the purchase orders. The breach in question was so serious as to affect the substratum of the contract as what was delivered did not meet the conditions in the purchase orders. (paras 45 & 46)

(2) The defendants contended that: (i) the plaintiff had accepted the delivered laptops because the laptops went through two stages of inspection, namely at Menara Safuan and during the delivery of 1,011 units of laptops at the respective PPDs; and (ii) by acknowledging the delivery orders 'goods received in good condition', the plaintiff had received the 1,011 units of delivered laptops. The inspection at Menara Safuan could not constitute reasonable opportunity for the purpose of ascertaining whether the laptops were in conformity with the contract as only aesthetic checks were performed and there was simply insufficient time to perform a detailed and/or technical inspection on each and every laptop stored at the said location. Logical reasoning dictated that it would take time to check each delivered laptop to ascertain whether it complied with the agreed specifications. The defects discovered could not readily be gleaned from a visual inspection. Therefore, the inspection at Menara Safuan and the acknowledgment of the delivery orders did not waive the plaintiff's rights of a reasonable opportunity of examining the laptops under s. 41 of the SOGA nor cl. 4 of the purchase orders. (paras 58, 61, 63 & 64)

(3) The laptops delivered by D2 clearly did not meet the agreed specifications and/or were not of merchantable quality and/or not fit for purposes of the CERDIK initiative which went to the root of the contract. This would entitle the plaintiff at once to treat the contract as at an end. Although the balance of 1,489 units were not yet delivered, the contract was an entire contract and not divisible as the plaintiff had made a single purchase of 2,500 units of laptops with entirely similar specifications from D2 in one purchase order. The 1,011 units delivered so differed from the plaintiff's requirements as to lead to the inference

A that D2 could not or would not deliver the kind of laptops contracted for in the future. The plaintiff, if it had lost confidence or trust in D2 was, as such 'under no obligation to wait to see what may happen; it can at once cancel the contract and rid itself of the difficulty'. Further, there was nothing to show that the defendants had demonstrated any intention B to deliver the remaining 1,489 laptops and other devices under the contract within a reasonable time after receipt of the plaintiff's letter to D1 and/or D2 or to dispute termination. (paras 67-69)

(4) The plaintiff was entitled to claim a refund of the sum of RM3,239,681.30 comprising monies paid for the 1,011 laptops in the C sum of RM1,259,706 at RM1,246 per laptop and the sum of RM1,979,975.30 paid for the 1,489 units of undelivered laptops. (para 76)

(5) The elements of unjust enrichment had been made out in this case. The plaintiff had paid the sum of RM3,239,681.30 to D2. The sum was paid D on a basis which failed – for the supply of laptops that were in accordance with the agreed specifications and/or merchantable quality and/or fit for purposes of the CERDIK initiative. Considering the matter from the wide-angle lens of justice, D2 would be enriched and it would be unconscionable or unjust to allow D2 to retain the monies E paid at the plaintiff's expense when D2 had disregarded with impunity the bargain struck with the plaintiff. D2 must return the money to the plaintiff for this failed transaction premised on the principle against unjust enrichment. (para 80)

(6) Collecting from the surrounding circumstances the materials which F threw light on D1's state of mind, he had intentionally made false representations that D2 had ready stocks and was able to supply 2,500 units of laptops that met the specifications required under the CERDIK initiative, and believing the representations to be true, the plaintiff did pay a sum of RM1,401,750 representing 45% of the deposit for 2,500 G laptops when the defendants were still looking for another 1,000 laptops. As a result of the reliance on such representations, the plaintiff had suffered damages. The plaintiff ought to be put back to the position as if the breaches of contract or fraudulent misrepresentations never happened and the plaintiff ought to also be fully indemnified for all the H losses flowing from the breaches and acts of fraudulent misrepresentation. The quantum of damages based on breaches and fraudulent misrepresentation would effectively be the same as the plaintiff's claim for breach of contract. (paras 85 & 89)

(7) D2 must show that these damages sustained was due to the breach of I contract by the plaintiff in order to succeed in its counterclaim. On the contrary, it was D2 that was in breach of contract. Thus, the counterclaim was untenable. (para 92)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Appeal [1995] 3 CLJ 639 CA ***(refd)***

ALW Car Workshop Sdn Bhd v. AXA Affin General Insurance Bhd [2019] 7 CLJ 667 FC ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Browne v. Dunn (1893) 6 R 67 ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gopinathan Subramaniam v. Timbalan Menteri Dalam Negeri & Ors [1999] 7 CLJ 558 HC ***(refd)***

Hu Chang Pee v. Tan Sri Datuk Paduka (Dr) Ting Pek Khiing [1999] 7 CLJ 328 HC ***(refd)***

Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***

Kee Wah Soong v. Yap Boon Hwa & Another Appeal [2018] 1 LNS 1284 CA ***(refd)***

Maple Flock Company, Limited v. Universal Furniture Products (Wembley), Limited [1932. M. No. 1997.] [1934] 1 KB 148 ***(refd)***

Md Zainudin Raujan v. PP [2013] 4 CLJ 21 FC ***(refd)***

Panatron Pte Ltd & Anor v. Lee Cheow Lee & Anor [2001] 3 SLR 405 ***(refd)***

Rookes v. Barnard & Ors [1964] AC 1129 ***(refd)***

Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Smith New Court Securities Ltd v. Citibank NA [1996] 4 All ER 769 ***(refd)***

William Derry, JC Wakefield, MM Moore, J Pethick, And SJ Wilde Appellants; And Sir Henry William Peek, Baronet Respondent (1889) 14 App Cas 337 ***(refd)***

Yam Kong Seng & Anor v. Yee Weng Kai [2014] 6 CLJ 285 FC ***(refd)***

Yap Boon Hwa v. Kee Wah Soong [2019] 1 LNS 1157 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 17

Evidence Act 1950, ss. 3, 35

Sale of Goods Act 1957, ss. 4(1), 12, 13, 15, 16(1)(a), 41, 42

For the plaintiff - Kenny Lam Kian Yip & Stephanie Chong Keh Yin; M/s Rosli Dahlan Saravana Partnership

For the defendants - Syarah Syazwan & Ramlan Khamis; M/s Ramlan Khamis & Co

Reported by Lina E

JUDGMENT

Liza Chan Sow Keng JC:

Introduction

[1] In this action, the plaintiff claimed the sum of RM3,239,681 (comprising a sum of RM1,259,706 paid for 1,011 units of laptops delivered and a sum RM1,979,975.30 being the deposit paid for the 1,489 units of laptops and/or other devices including dongles that remain undelivered); storage charges, costs of the replacement of the defective laptops in the sum of RM3,439,000, alternatively, damages against:

A (i) the first defendant ("D1") for the tort of deceit and misrepresentation, and

(ii) the second defendant ("D2") for breach of contract and unjust enrichment in respect of laptops supplied to the plaintiff that were alleged to be of unmerchantable quality, unfit for the purpose of CERDIK and/or did not meet the specifications.

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[2] During trial agreed to be conducted virtually online by using the Zoom video conferencing platform, lasting three days, the plaintiff called six witnesses to adduce evidence whilst the defendants called four witnesses in support of the defence.

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[3] I had on 29 November 2022 allowed the plaintiff's claim. This judgment contains the reasons for my decision.

Background Facts

D **[4]** D1 is the Managing Director and Chief Executive Officer of D2.

[5] D2 at all material times offers services related to ICT Management (Information and Communication Technology), SAP Management (System Application and Products) and Project Management.

E **[6]** Arising from the outbreak of the COVID-19 pandemic, in March 2020, the Government of Malaysia introduced the Movement Control Orders ("MCO"). The MCO amongst others, restricted outdoor activities and students' physical attendance at schools. Students had to adjust to the new normal of online lessons, e-learning and other forms of remote teaching.

F **[7]** The Minister of Finance in Budget 2021, in October 2020, introduced an initiative known as Tabung Cerdik ("CERDIK") with its main purpose at the material time to provide support through free laptops and dongle internet (hereafter collectively referred as "devices") to the most marginalised students and/or to students who cannot afford electronic devices for online lessons/learning.

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[8] The plaintiff was appointed as the secretariat of CERDIK, responsible for, amongst others, the procurement, checking and delivery of the devices to the respective District Education Office (Pejabat Pendidikan Daerah). This responsibility included the selection of a vendor who is able to supply and deliver sufficient devices within a short period of time, in view of the urgent need by students of the devices to access online learning, especially in rural areas during the MCO.

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[9] During the selection process of the vendor, six suppliers took part including D2, represented by D1. D1 and the plaintiff communicated *vide* telephone calls, WhatsApp communication and/or physical meetings.

I

[10] D1 had carried out a presentation and/or demonstration of an unused sample laptop to be supplied to the plaintiff in a physical meeting on 28 January 2021 and/or 2 February 2021 and the said sample is in good working condition and without any defect in the eyes of the plaintiff at the material time.

[11] Based on, amongst others, D2's quotations dated 27 January 2021, 8 February 2021 and 16 February 2021 submitted to the plaintiff, the plaintiff issued purchase orders in January and February 2021:

(i) to purchase 2,500 units of laptop at the price of RM1,246/unit based on the specifications stated in the purchase order dated 28 January 2021 (see p. 213 CBD2);

(ii) to top up a lump sum of RM150,000 to upgrade all 2,500 units of laptop to Core i5 laptop pursuant to purchase order dated 10 February 2021 (see p. 214 CBD2); and

(iii) to purchase 2,500 units of dongle internet at the price of RM220/unit based on the specifications stated in the purchase order dated 15 February 2021 (see p. 215 CBD2)

(Collectively referred to as "purchase orders").

[12] In cl. 4 of the purchase orders, the plaintiff had reserved its rights to reject goods that are not in good order or condition as determined by the plaintiff's quality control. Clause 4 reads:

> 4. Condition: We reserve the right to reject goods that are not in good order or conditions **as determined by our quality control**.
>
> (emphasis added)

[13] D2 issued the following invoices to the plaintiff:

(i) invoice dated 29 January 2021 for the sum of RM1,401,750, being 45% of the total value of purchase order dated 28 January 2021 (see p. 218 CBD2);

(ii) invoice dated 10 February 2021 for the sum of RM685,300, being part payment of the total value of purchase order dated 28 January 2021 (see p. 219 CBD2);

(iii) invoice dated 10 February 2021 for the sum of RM150,000, being an increased payment to upgrade all laptops to Core i5 laptops (see p. 220 CBD2);

(iv) invoice dated 11 February 2021 for the sum of RM562,631.30, being part payment of the total value of purchase order dated 28 January 2021 (see p. 221 CBD2); and

(v) invoice dated 15 February 2021 for the sum of RM440,000, being 80% of the total value of purchase order dated 15 February 2021 (see p. 222 CBD2)

(Collectively referred to as "invoices").

[14] Based on the purchase orders and invoices, a contract for sale was concluded between the plaintiff and D2 ("contract").

[15] The plaintiff as at 15 February 2021, paid a total sum of RM3,239,681.30 in three tranches under the contract:

Date of payment	Amount
29 January 2021	RM1,401,750
11 February 2021	RM1,247,931.30
15 February 2021	RM590,000
Total	RM3,239,681.30

[16] 1,011 units of laptops were then delivered to four Pejabat Pendidikan Daerah ("PPD"), as follows:

Date of delivery	PPD	Units
19 February 2021	Klang	388
20 February 2021	Kuala Langat	390
22 February 2021	Sik	63
22 February 2021	Kulim	170
Total		1,011

[17] The respective PPDs performed a detailed examination on the 1,011 units of delivered laptops and found a substantial number of laptops turned out to be defective and do not conform with the specifications stated in the purchase orders and/or invoices.

[18] The plaintiff did not intend to continue with the procurement and/or further procurement of devices with D2 and no further delivery of the devices was made.

[19] The plaintiff issued a draft termination letter of the contract to D1 and/or D2 defendant on 1 March 2021.

[20] Paragraphs 4 to 19 are agreed facts.

[21] There is a dispute on what lead to the plaintiff appointing D2 as the vendor for the laptops. The plaintiff alleged that certain fraudulent representations were made to the plaintiff by D1 which led to its decision to contract with D2 for the supply of devices under the CERDIK initiative. Hence this action by the plaintiff for the relief set out in para. 1 of this judgment.

[22] The defendants denied these allegations and D2 counterclaimed for storage charges of RM36,000 (and continuing) for the undelivered devices.

Parties' Contentions

[23] The plaintiff contended that prior to the issuing the first purchase order on 28 January 2021 to D2, D1 had made, amongst others, the following representations to the plaintiff:

(i) that D1 and/or D2 had access to ready stocks of unused laptops that are sufficient for the purposes of supply to the plaintiff for the CERDIK initiative (see pp. 53 to 57 CBD2);

(ii) that D2 is able to supply 2,500 units of unused laptops that meet the specifications required under the CERDIK initiative (see pp. 194 to 195 CBD2); and

(iii) D1 had demonstrated a sample laptop which appears to be in good working condition and does not contain any defects.

[24] Relying on the said representations by D1, and in view of the urgent need of the devices, the plaintiff decided to contract with D2 for the supply of devices under the CERDIK initiative. A detailed examination on the 1,011 units of delivered laptops revealed that a substantial number of laptops were defective and do not conform with the specifications stated in the purchase orders and/or invoices. The plaintiff proceeded to terminate the contract.

[25] In essence, the defendants' contended that:

(i) D1 should not be personally liable for tort of deceit and/or fraudulent misrepresentation;

(ii) D1 and/or D2 did not promise to supply brand new laptops;

(iii) the laptops went through two stages of inspection, namely:

  (a) the purported inspection that has taken place at Menara Safuan on 20 February 2021; and

  (b) the purported inspection took place during the delivery of 1,011 units of laptops at the four respective PPDs.

(iv) by acknowledging the delivery orders (at pp. 233 to 236 CBD2), the plaintiff had accepted the 1,011 units of delivered laptops; and

(v) termination of the contract was premature as the defective laptops are covered under the warranty stated in D2's invoices and/or the delivery orders.

[26] Consequently, the second defendant counterclaimed for storage charges of the 1,489 units of undelivered laptops.

Analysis And Findings

[27] As I see it, the primary issues for determination may be stated as such:

(i) whether D2 is in breach of contract;

(ii) whether the plaintiff had accepted the 1,011 units of laptops which were delivered;

(iii) whether the plaintiff is entitled to terminate the contract and claim for damages;

(iv) whether D2 was unjustly enriched;

(v) whether D1 is personally liable for the tort of deceit and/or fraudulent misrepresentation and if so, what is the measure of damages;

(vi) Whether D2 is entitled to the counterclaim.

Whether D2 Is In Breach Of The Contract?

[28] I think the starting point is to address what the parties have agreed. As alluded earlier, it is undisputed that that the purchase orders and invoices form a binding contract between the plaintiff and D2 – para. 13 of the statement of agreed facts dated 6 February 2022.

[29] One of the main specifications of the laptops to be delivered is that the laptops must contain a Windows 10 Home Operating System – see purchase orders at pp. 213, 214, 218 to 221 CBD2.

[30] Amongst the 1,011 units of laptop delivered as at 22 February 2021, the defects found in a substantial number of units (approximately 966 units, p. 283 CBD2) are described as follows:

(i) most of the laptops are old, refurbished laptops;

(ii) there are no and/or pirated operating system in most of the laptops;

(iii) there are hard disks without bracket;

(iv) there are cracks on the surface and/or bracket of the screen of the laptops;

(v) there are power cords which are not in compliance with Malaysian specifications;

(vi) there are no and/or faulty webcam on some of the laptops;

(vii) there are incompatible adapters with some of the laptops;

(viii) there are faulty touchpads on some of the laptops;

(ix) there are faulty batteries in some of the laptops; and

(x) there are faulty chargers with some of the laptops.

[31] The details of the defects are more particularly set out in pp. 278 to 308 CBD2 of the Ministry of Education Report ("the report"). A summary of findings in relation to the defects found in the laptops delivered by D2 were shown in the tables at pp. 291 to 310, CBD2, encl. 49. These tables prepared by the relevant PPD officers, were relied upon by PW6 in the preparation of the report. Counsel for the plaintiff has summarised the tables as follows:

	Nature of Defects	No. of Laptops			
		Klang	Kuala Langat	Kulim	Sik
1.	Processor (Core i3)	5	–	–	–
2.	Operating System (not genuine)	362	342	102	34
3.	No built-in wifi	95	08	176	1
4.	Faulty Webcam/ Camera	99	10	175	2
5.	Faulty Battery	105	07	–	7
6.	Faulty Adapter	6	13	2	13
7.	Faulty Charger	–	–	–	–
8.	Faulty Audio	95	16	–	–
9.	Physical damage	9	–	159	50

[32] In this respect, the plaintiff called PW6, who is the Timbalan Setiausaha Bahagian di Bahagian Pengurusan Maklumat, Kementerian Pendidikan Malaysia as the maker of the report, to testify and confirm the contents therein.

[33] The actual contents of the report as to the extent of defectiveness of the devices were not challenged during cross-examination of PW6 except that the defendants:

(i) postulated that there is uncertainty on whether the reports referred to by PW6 in p. 278 until p. 308 CBD2 are actual reports made by PPD officers that is PW2, PW3 dan PW4. These PPD officers' report is not before the court;

(ii) contended that PW6 is not a credible witness and does not have personal knowledge of the matter as:

(a) she left PPD Klang at 4.30pm; the laptops were delivered at 4.30pm; she would not have the time to inspect the laptops with other PPD officers and she then changed her evidence to say she left at 5pm;

(b) she said only 40 to 50 laptops were examined but the initial report said eight units were examined;

(iii) submitted that it is unsafe to rely on the report and a validation technician or expert should be called.

[34] The plaintiff in rebuttal contended that the PPD officers who had prepared their own reports and tables had done so in the course of their public duty. PW6 who prepared the report is entitled to rely on the relevant PPD officers' reports pursuant to s. 35 of the Evidence Act 1950 which reads:

> Relevancy of entry in public record made in performance of duty
>
> 35. **An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty** or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.
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> (emphasis added)

[35] The plaintiff further argued that Augustine Paul J in *Gopinathan Subramaniam v. Timbalan Menteri Dalam Negeri & Ors* [1999] 7 CLJ 558; [2000] 1 MLJ 65 held that s. 35 Evidence Act 1950 also applies to a report prepared by a public servant in the discharge of his duties:

> Although s. 35 refers to a book, register or other official record *it has been held that that section also applies to a report if it is proved to have been prepared by a public servant in the discharge of his official duty or by another person in the performance of a legal duty* (see *Krishna Nanda v. The State* 1958 AIR Pat 166; *Baldeo Das v. Gobind Das* ILR 36 All 161). Thus, the report, being a document prepared by a public servant in the discharge of his official duty, is admissible under s. 35. (emphasis added)

[36] The plaintiff additionally submitted that evidence admitted under s. 35 Evidence Act 1950 constitutes substantive evidence without the need to call the makers citing Abdoolcader FJ's judgment in *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 at p. 110; [1983] 2 MLJ 232 at p. 272:

> When it is the duty of a public officer to make some entries in any public or other official book it is admissible in evidence to prove the truth of the facts entered as well as the fact that the entries were made by him **although their authenticity be not confirmed by the usual test of truth, namely, the swearing and cross-examination of the person who prepared them.** (emphasis added)

[37] Having seen and heard the witnesses, this court finds the defendants' contentions hold no water as it was always open to the defendants themselves to undertake a verification exercise on the quantity and condition of the rejected laptops through their own witnesses or expert. I see no reason why the report cannot be used. Based on documentary evidence and the oral testimony of witnesses, I am of the view that the plaintiff had on a balance of probabilities proven that the devices supplied were not reasonably fit for the purpose.

[38] In fact, after hearing and observing the plaintiff's witnesses, PW2, PW3, PW4 and PW6, I find that they are straightforward witnesses, and they had nothing to gain by embellishing the conditions of the devices meant for marginalised kids so they could access online lessons. I found their evidence coherent, convincing and accord with the inherent probabilities and I accept their evidence. Their evidence must carry significant weight for the simple reason that each of them have no interest in the outcome of the case, clearly has no motive to give any biased evidence and this court should treat them as independent witnesses of truth.

[39] As "evidence" is not confined to documents and the court is enjoined by s. 3 of the Evidence Act 1950 to consider oral statements by witnesses, the evaluation and assessment of the credibility (or otherwise), of the witnesses were crucial to the present case. This court has to consider the following factors as expounded by various authorities:

(i) the inherent probability or improbability of representations of fact;

(ii) the presence of independent evidence tending to corroborate or undermine any given statement of fact;

(iii) the presence of contemporaneous records;

(iv) the demeanour of witnesses;

(v) the frailty of the population at large in accurately recollecting and describing events in the distant past;

(vi) whether the witness takes refuge in wild speculation or uncorroborated allegations of fabrication;

(vii) whether the witness had a motive for misleading the court; and

(viii) weigh up one witness against another.

[40] In assessing the facts in issue on the basis of their "inherent probability or improbability" I am guided by the Federal Court in *Md Zainudin Raujan v. PP* [2013] 4 CLJ 21; [2013] 3 MLJ 773:

> [33] It is trite that the inherent probability or improbability of a fact in issue must be the prime consideration in deciding whether a witness is credible or not. It is the duty of the court to sieve the evidence and to ascertain what are the parts of the evidence tending to incriminate the accused

which he accepted. In *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p. 79 Augustine Paul J (as he then was) summed up the tests for determining the credibility of a witness as follows:

> The Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case (see *Bhojraj v. Sitaram* 1936 AIR PC 60). … It must, however, be observed that being unshaken in cross-examination is not *per se* an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration (see *Muniandy & Ors v. Public Prosecutor* [1966] 1 MLJ 257). It has been held that if a witness demonstrably tells lies, his evidence must be looked upon with suspicion and treated with caution, but to say that it should be entirely rejected would be to go too far (see *Khoon Chye Hin v. Public Prosecutor* [1961] MLJ 105). It has also been held that discrepancies and contradictions there will always be in a case. In considering them, what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy (see *De Silva v. Public Prosecutor* [1964] MLJ 81). The Indian Supreme Court has pointed out that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments (see *Ugar v. State of Bihar* 1965 AIR SC 277). It is useful to refer to *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 where Raja Azlan Shah FJ (as His Highness then was) said at p. 19:
>
> > In my opinion, *discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened … The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all.* A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.
>
> In the absence of any contradiction, however, and in the absence of any element of inherent improbability, the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted (see *Public Prosecutor v. Mohamed Ali* [1962] MLJ 257). (emphasis added)

[41] There is no doubt that PW6 may have been unsure of herself in respect of what time she arrived and left PPD Klang and how many laptops were examined, but I find on the whole, that she was a credible witness. If at all, there were discrepancies in her evidence, they were minor or not relevant and does not change the fact that the laptops supplied were defective and not according to specifications.

[42] That there are defects is not disputed by the defence. The defendants took the position that the defective laptops can be replaced under the warranty provided by D2 in its invoices and delivery orders.

[43] But the plaintiff do not agree as the extent of defects is substantial, and fundamental specifications agreed were also not met in each defective laptop. This includes the operating system of the laptop, wherein approximately 842 units out of the 1,011 units of delivered laptops to PPD Sik, Kulim, Klang and Kuala Langat as shown at p. 282, CBD2 have pirated versions of the operating system:

Lokasi	Kuantiti	Operating System	
		ORIGINAL	CRACK
PPD Kuala Langat	390	48 (12%)	342 (88%)
PPD Klang	388	26 (7%)	362 (93%)
PPD Kulim	170	66 (39%)	104 (61%)
PPD Sik	63	29 (46%)	34 (54%)

[44] In my view, the defendants' much touted one-year warranty cannot be a panacea to cure all ills in this case since the warranty is cast in these words "For Motherboard and Operating System Software" as stated in the invoices and delivery orders.

[45] I find that the contract is a contract for the sale of goods within the meaning of s. 4(1) of the Sale of Goods Act 1957 ("SOGA") as it is a contract whereby the seller (D2) agreed to transfer the property in the goods (the devices) to the buyer (plaintiff) for a price. In this case, the devices being purchased as stated in the purchase orders were laptops Fujitsu/Asus/Lenovo (mixed), and which was further described as devices with Windows 10 operating system, ram size: 8GB, hard drive capacity: 256GB SSD, processor type: Intel Core i3, no of CPU cores: dual core, built in Wi-Fi, inclusive of laptop bag. There was therefore the implied condition that the goods (the product) to be supplied under the purchase orders must comply with that description within the meaning of ss. 15 and 16 SOGA which read as follows:

> 15 Sale by description
>
> Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

16. Implied condition as to quality or fitness

16(1) Subject to this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be reasonably fit for such purpose:

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

(b) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examined ought to have revealed.

(2) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(3) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

[46] The devices delivered by D2 to the plaintiff has to match those specifications in the purchase orders. Examining the consequences of the alleged breach, clearly, there can be no doubt that the breach in question is so serious as to affect the substratum of the contract as what was delivered did not meet the conditions in the purchase orders. I am of the view that the requirements of s. 16(1)(a) SOGA have also been satisfied as:

(i) through various meetings with D1, the plaintiff had made it very clear to the D1 that the delivery of laptops in good condition without delay is of utmost importance in light of the CERDIK initiative for laptops and devices to be distributed to school children quickly;

(ii) the plaintiff had relied on D1's expertise in the IT industry to supply the laptops and devices to the plaintiff. In the present case, it is undisputed that D2 is in the ICT industry/business, wherein supply of laptops is within the course of business of D2;

(iii) the plaintiff also relied on D1 and/or D2's representations that it is a credible supplier with its prior experience in the supply of services concerning the digital and IT sector to major companies in the market (see pp. 19 to 21, 134 CBD2).

[47] Bearing in mind that the report is largely uncontroverted, with respect, I hold the view that it is pretty much non-negotiable that there should be no pirated operating system in such vast numbers of devices.

[48] The court cannot ignore with equanimity and is also entitled to take judicial notice of the inherent security risks involved in using pirated software such as being exposed to trojans, malware and even ransomware, let alone violation of software copyright laws. It is with utmost respect, sheer common sense. Also, with vast numbers too lacking built in Wi-fi and no web-camera, it begs the burning question how the children can access online lessons? The grim reality is the children deserve better. There is a judicial concern and anyone should be sorry and ill at ease to suffer the children to use laptops with pirated software. In my opinion, no reasonable, right-minded buyer would accept the devices that contained such serious defects as pleaded in para. 19 of the amended statement of claim and contained in the report. Further, it does not add up for the plaintiff to want to simply reject the devices if repairs could be undertaken swiftly as the whole purpose was to ensure the children in the rural areas access online lessons in a short period of time so that they are not left out.

[49] I have not overlooked that there is some considerable dispute over whether the plaintiff agreed to accept old stocks. For a start, it is to be observed that item 2.5 of minutes of meeting dated 3 February 2021 shows PW5 had emphasised 'time frame of delivery, despite its challenges. YH will not tolerate any delays. The laptops that delivered (*sic*) need to be in decent qualities and good condition based on the technical specifications as requested. It is to avoid any backlash as CERDIK has become public interest and scrutiny nowadays.' At item 2.6, 'Sigma adhere to the timeline given and will deliver good quality laptops, although it is old stock.' Given the urgency for the laptops as the MCO was in force and based on the minutes of meeting, I find that the plaintiff had in fact agreed to purchase old stock. This however does not assist the defence one whit as it is my respectful view that even the broadest interpretation of the word 'old stock' cannot accord a meaning to include used and/or defective laptops or laptops that are not of merchantable quality. I therefore do not think that there was a material contradiction in PW5's testimony with her police report that mentioned 'unused laptops'.

[50] Testing the defendants' evidence against the totality of the contemporaneous documents and looking at not just the provisions of the contract but also the nature of the contract, its subject matter, the surrounding circumstances and the conduct of the parties towards each other, support the conclusion that D2's obligations to supply 2,500 units of laptop fit for purposes of the CERDIK initiative pursuant to the specifications stated in the purchase orders and/or invoices are fundamental terms or conditions and pursuant to ss. 12, 15 and 16 SOGA, D2's failure to deliver the laptops in accordance with the said provisions of the contract goes to the root of the contract which has been clearly breached.

[51] I do not think anything turns on D1's contention that the defendants had shown a sample laptop to PW5 on 29 January 2021 which contained defects. Firstly, this is not a sale by sample. Second, it defies common sense that as this sample had defects, it is as such excusable that the laptops to be supplied to the plaintiff will be defective. Third, there is a clear judicial admission in para. 4(f) of the reamended defence and counterclaim that D1 has informed the plaintiff that if the plaintiff agrees to accept old stocks, the defendants will ensure that the laptops will be almost the same quality as a new laptop and conform to the specifications set by the plaintiff. Paragraph 4(f) of the re-amended defence and counterclaim reads:

> (f) Defendan Pertama juga telah memaklumkan wakil Plaintif bahawa *sekiranya pihak Plaintif bersetuju untuk menerima komputer-komputer stok lama yang akan dinaiktaraf sebagai alternatif bagi memenuhi keperluan mendesak Plaintif tersebut, Defendan-defendan akan memastikan bahawa komputer-komputer riba berkenaan berada dalam kualiti yang hampir sama dengan komputer riba baharu serta sesuai dengan spesifikasi yang ditetapkan oleh Plaintif,* namun secara munsabahnya tidaklah sama seperti kualiti sebuah komputer riba yang baharu; (emphasis added)

[52] The term "judicial admission" is explained in the case of *Hu Chang Pee v. Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 7 CLJ 328; [1999] 3 MLJ 402, where Hasan JC, stated:

> The learned authors in *The Law of Evidence by Ratanlai and Dhirajlal* (17 Ed, 1987) made the following comments relating to s. 17 of the Evidence Act at p. 53:
>
> Admissions may be oral or contained in documents, *eg*, letter, depositions, affidavits, plaints, written statements, deeds, receipts, horoscopes. **Admissions in pleadings are judicial admissions. They can be made the foundation of rights.** (emphasis added)

[53] In *Yam Kong Seng & Anor v. Yee Weng Kai* [2014] 6 CLJ 285; [2014] 4 MLJ 478 FC at [16], Suriyadi Halim Omar FCJ reiterated that it is trite law that a judicial admission made in a pleading stands on a higher footing than evidentiary admission.

[54] In light of the judicial admission that the laptops to be supplied will be almost the same quality as a new laptop and conform to the specifications set by the plaintiff, with utmost respect, it is both cheeky and clutching at straws for D1 to now postulate the laptops to be supplied will be according to sample shown on 29 January 2021 to the plaintiff.

[55] At any rate, I find sale by sample was not pleaded by the defendants.

Whether The Plaintiff Had Accepted The 1,011 Units Of Delivered?

[56] In considering this issue, it will be necessary to bear in mind ss. 13, 41 and 42 SOGA:

13. When condition to be treated as warranty

(1) Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods of the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract express or implied to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty the fulfilment of which is excused by law by reason of impossibility or otherwise.

41. Buyer's right of examining the goods

(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

42. Acceptance

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

[57] Section 13 envisaged that if the goods were accepted, the plaintiff can only treat the breach by D2 as a breach of warranty and entitled to sue D2 for damages only. Has the plaintiff accepted the 1,011 units of laptops?

[58] The defendants contended that the plaintiff had accepted the delivered laptops because:

(i) the laptops went through two stages of inspection, namely:

(a) the Menara Safuan inspection on 20 February 2021; and

(b) the inspection took place during the delivery of 1,011 units of laptops at the respective PPDs.

(ii) by acknowledging the delivery orders "goods received in good condition" (pp. 233 to 236 CBD2), the plaintiff had accepted the 1,011 units of delivered laptops.

[59] According to the defendants, s. 41 SOGA and cl. 4 of the purchase orders wherein the plaintiff had reserved rights to reject the goods that are not in good order or conditions as determined by its quality control are not applicable as there was examination and quality control prior delivery to PPD Sik and Kulim, and in this regard, PW5, PW6 – together with EY auditor were present. This is compounded by the acknowledgment of the delivery orders that goods were received in good condition except for PPD Langat where only 15 laptops were found problematic.

[60] The plaintiff on the other hand submitted that there was no acceptance within the meaning of ss. 41 and 42 SOGA because:

(i) The plaintiff had reserved its rights to perform inspection under cl. 4 of the purchase orders, and this has never been waived and or disputed by the defendants;

(ii) The plaintiff had no reasonable opportunity to examine all the laptops prior and/or at the time of delivery; and

(iii) The plaintiff had promptly intimated its intention to reject the delivered laptops and terminate the contract upon initial discovery of the defects.

[61] From the evidence adduced, I accept and find that the inspection which took place at Menara Safuan on 20 February 2021 cannot constitute reasonable opportunity for the purpose of ascertaining whether the laptops were in conformity with the contract as only aesthetic checks were performed and there is simply insufficient time to perform a detailed and/or technical inspection on each and every laptop stored at the said location as at the material time, PPD officers in Kulim and Sik were awaiting the delivery of laptops.

[62] It is to be borne in mind that the check at Menara Safuan was prompted by the initial comments of the officers from PPD Klang that the aesthetic conditions of the laptops delivered were not satisfactory. DWI confirmed "tidak sempat" to check all, so too DW4 who said "QC itu, pasal kita orang bukan yang teknikal expert, so more to aesthetic sahaja, keadaan laptop itu macam mana." That the checking was only based on aesthetic condition was also confirmed by PW5:

KLKY: Adakah pemeriksaan terperinci dibuat terhadap kesemua laptop tersebut?

Sharifah: Tidak. *Pemeriksaan lebih kepada kita melihat keadaan estetik laptop sahaja.*

KLKY: Kenapa?

Sharifah: *Kerana saya telah mendapat laporan awal atau complaint awal daripada pegawai PPD yang menyatakan "Keadaan laptop-laptop yang diterima daripada segi estetiknya tidak memuaskan hati".*

KLKY: Kenapa pemeriksaan berakhir pada pukul 04:00PM dan bukan lebih lewat daripada pukul 04:00PM petang?

Sharifah: Kerana pada 21hb, jadual penghantaran, adalah sepatutnya jadual penghantaran ke PPD Kulim dan PPD Sik berlaku pada hari tersebut yang mana pegawai PPD Kulim dan juga Sik telah menunggu di PPD masing-masing akan kedatangan laptop-laptop tersebut daripada, sebenarnya daripada pagi.

KLKY: So mereka sedang menunggu?

Sharifah: Ya. Betul. (emphasis added)

[63] With respect, I am of the view that nothing much turns on the fact that there was acknowledgment on the delivery orders that the laptops were received in good condition. I accept the PPD officers' (PW1 to PW4) explanations that the 1,011 units of laptops were only received in accordance with the quantity they were instructed to receive at the time of delivery, and that the detailed inspection would be performed later. In the instant case, I am of the respectful view that logical reasoning dictates that it will take time to check each delivered laptop to ascertain whether it complied with specifications of a Windows 10 operating system, ram size: 8GB, hard drive capacity: 256 GB SSD, processor type: Intel Core i3, no of CPU cores: dual core, built in Wi-Fi. It is significant to note that the defects discovered cannot readily be gleaned from a visual inspection for *eg*, whether the operating system is a pirated version, whether there are hard disks without bracket; whether the power cords are not in compliance with Malaysian specifications; whether there are no and/or faulty webcam; whether there are incompatible adapters; whether there are faulty touchpads; whether there are faulty batteries and whether there are faulty chargers. There can be no question that the plaintiff did not waive its rights by electing to affirm each alleged breach. Since D1 himself had freely admitted in evidence that the delivered laptops are not in good condition, the signed delivery orders which state that the laptops are received in good condition ought not to be relied on and cannot amount to acceptance. An excerpt of PW2's evidence that laptops were 'checked randomly only' is self-explanatory:

Pages 19 to 25 Notes of Proceedings dated 04.07.2022, Enclosure 98

Nurul: Ok. Saya ingin ambil kesempatan dekat sini pada kejadian penerimaan komputer riba diterima sebanyak 390 unit jumlah yang banyak. Saya hanya memfokuskan jumlah kuantiti tersebut. Sementara lori menunggu. Jadi beberapa juruteknik komputer yang ada hanya dapat sempat menyemak secara

random sahaja. Dengan keadaan begitu jumlah kuantiti yang banyak jadi fokus kat saya adalah untuk memastikan jumlah kuantiti 390 unit adalah betul dan tepat dan saya tandatangan. Itu sahaja.

Saya adalah berjawatan penolong pegawai tadbir. Jadi saya hanya adalah pegawai penerimaan barang. Untuk melihat keadaan barang tersebut lebih terperinci, saya memanggil beberapa orang juruteknik, juruteknologi komputer, juruteknik komputer. Jadi merekalah yang membantu sama-sama melihat keadaan laptop tersebut, komputer riba tersebut.

KLKY: Soalan terakhir Puan. Semasa Puan menurunkan tandatangan terhadap delivery order tersebut di muka surat 311 di Bundle CBD2. Soalan saya semasa Puan menurunkan tandatangan terhadap delivery order ini, adakah pemeriksaan terhadap semua 390 unit komputer sudah siap?

Nurul: Pada ketika itu tidak siap. Secara random sahaja.

[64] I therefore find that the inspection at Menara Safuan and the acknowledgment of the delivery orders do not waive the plaintiff's rights of a reasonable opportunity of examining the laptops under s. 41 SOGA nor condition 4 of the purchase orders.

[65] There is also no question of any delay on the part of the plaintiff in rejecting the laptops as it did on 1 March 2021 which is a time frame of about a week to ten days from each delivery (as set out in para. 16 above) sent a draft termination letter to the D1 and/or D2. In the covering email dated 1 March 2021, the plaintiff had clearly expressed its intention to terminate the contract and return the 1,011 units of laptops to D1 and/or D2. D1 during cross-examination admitted that he in fact was notified as early as 23 February 2021 of the intention to terminate the contract:

Pages 71 to 72 Notes of Proceedings dated 05.07.2022, Enclosure 99

KLKY: Pergi ke muka surat 237, bundle yang sama. Sekarang ini, ini notis penamatan, ya, yang dikeluarkan oleh Yayasan Hasanah.

Dr Nizam: Ya.

KLKY: Setuju, ya? Dan Dr Nizam dan Sigma ambil inilah sebagai notis penamatan oleh Yayasan Hasanah, ya?

Dr Nizam: Ini tarikh dia berapa, ya?

KLKY: Pergi muka surat 240.

Dr Nizam: Ok.

KLKY: Yang ini cover email, betul?

Dr Nizam: Yes, 1st March, ok.

KLKY: Ok, 1st March. Ok, so, ok. Bersama-sama emel ini dengan draf notis penamatan tersebut, Dr Nizam dan Sigma anggap inilah notis penamatan oleh Yayasan Hasanah, betul?

Dr Nizam: Tidak setuju, kerana saya telah diberitahu terlebih dahulu pada 23hb Februari itulah, untuk termination.

KLKY: So, lagi awal lagilah, memang ada minta terminate? Lagi awal daripada notis ini?

Dr Nizam: Yes.

[66] In my respectful view, the prompt notices by the plaintiff to D1/D2 fall within the meaning off intimation of rejection under s. 42 SOGA. This is not a case where after the lapse of a reasonable time, the plaintiff retained the laptops without intimating to D1 and/or D2 that the plaintiff rejected the laptops. It is only when the plaintiff is deemed to have accepted the laptops, it loses the right to reject for breach of conditions and can only claim for damages. I find however in this case, that there is no acceptance by the plaintiff in respect of the 1,011 units of laptop delivered by D2.

Whether The Plaintiff Is Entitled To Terminate The Contract And Claim For Damages?

[67] I have earlier found that: (i) the laptops delivered by D2 clearly did not meet the agreed specifications and/or are not of merchantable quality and/or not fit for purposes of the CERDIK initiative which went to the root of the contract. This would entitle the plaintiff at once to treat the contract as at an end; and (ii) there was no acceptance by the plaintiff of the laptops.

[68] Although the balance 1,489 units were not yet delivered, I find that the contract is an entire contract and not divisible as the plaintiff had made a single purchase of 2,500 units of laptops with entirely similar specifications from D2 in one purchase order. The 1,011 units delivered so differed from the plaintiff's requirements as to lead to the inference that D2 cannot, or will not, deliver the kind of laptops contracted for in the future. The plaintiff if it had lost confidence or trust in D2 is as such 'under no obligation to wait to see what may happen; it can at once cancel the contract and rid itself of the difficulty' – *Maple Flock Company, Limited v. Universal Furniture Products (Wembley), Limited.* [1932. M. No. 1997.] [1934] 1 KB 148 at pp. 153 and 154.

[69] There is nothing on record to show that the defendants have demonstrated any intention to deliver the remaining 1,489 laptops and other devices under the contract within a reasonable time after receipt of the plaintiff's letter of 1 March 2021 to D1 and/or D2, or to dispute termination.

[70] I ought to mention that D1 during cross-examination, testified that he agreed to refund the plaintiff but do not agree to the quantum and mentioned a claim of a 50% cancellation charge for last minute cancellation. I had invited the parties to submit on these points:

Pages 85 and 86 Notes of Proceedings, encl. 99

KLKY: **Sigma bersetuju menawarkan bayaran balik kepada Yayasan Hasanah sebab Sigma bersetuju untuk membuat bayaran balik kepada Yayasan Hasanah, setuju?**

Dr Nizam: **Yes. Only bayaran balik setuju lah tapi amount saya tak setuju.**

KLKY: Ok, baik, alright. Ok, so that's why soalan saya seterusnya, bayaran balik, sebenarnya, pihak Sigma bersetuju tapi hanya isu quantum pembayaran sahaja yang dipertikaikan, betul?

Dr Nizam: Betul.

KLKY: Ok. Saya rujuk Dr Nizam ke muka surat 202, CBD2. So ini quotation Dr Nizam, ya, Sigma, ya?

Dr Nizam: Betul.

KLKY: **Ok, sana ada satu terma, "last minute cancellation of PO will incur 50% penalty of the PO amount".**

Dr Nizam: Correct.

KLKY: Betul, ya? Ok, soalan saya.

Dr Nizam: Ya.

KLKY: **Sigma tidak pernah tuntut penalti ini daripada Yayasan Hasanah, betul?**

Dr Nizam: **Tidak betul. Saya pernah tuntut.**

KLKY: **Pernah tuntut? Ada dokumen sokongan?**

Dr Nizam: **Ada, saya ada melalui lawyer saya lah. Saya ada beritahu dia pasal quotation.**

KLKY: Ok. Pihak Sigma ada tuntut atau demand Yayasan Hasanah supaya mengambil baki 1,489 unit yang kononnya telah dibelikan oleh Sigma tak?

Dr Nizam: Saya tak setuju dengan statement "konon" tu.

KLKY: Ok tak apa, saya, ok.

Dr Nizam: Ya.

KLKY: I rephrase, ya?

Dr Nizam: Ya.

KLKY: Ok. Sigma ada minta Yayasan Hasanah supaya mengambil semua baki 1,489 unit laptop-laptop tak?

Dr Nizam: Sigma, tidak. Tidak ada.

KLKY: Tak tuntut, ya?

Dr Nizam: Tak. (emphasis added)

[71] I note cl. 4 of the quotation reserved D2's entitlement to a 50% cancellation charge for last minute cancellation was referred to in para. 4(g) of the re-amended defence and counterclaim, however I further observe that:

(i) D2 when issued the termination letter of 1 March 2021, did not elect to exercise its rights to claim for 50% of purchase price as stated in D2's quotations;

(ii) To raise it during trial, in my view on point of principle, is precarious as relief was not sought in the prayers, nor was this entitlement 'put' to any of the plaintiff's witnesses, thus attracting the application of the principle in *Browne v. Dunn* (1893) 6 R 67 and accepted by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Appeal* [1995] 3 CLJ 639; [1995] 2 MLJ 770 and in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 – it must be taken that D2 has abandoned its pleaded case.

[72] Strictly speaking, raising the 50% cancellation charge during trial is doomed to fail. The exposition of the law is neatly encapsulated in *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415; [2018] 2 MLJ 292, where the Federal Court reminded:

> [29] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v. Public Bank Bhd … In Lee Ah Chor v. Southern Bank Bhd* [2015] 6 MLJ 1; [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: … In *The Chartered Bank v Yong Chan* [1990] 1 MLJ 157; [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330, the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case, the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.

[73] In fact, the defendants in para. 26 of their submissions in encl. 120 candidly admitted this claim for 50% cancellation charge for last minute cancellation was never pleaded.

[74] In my respectful view too, a purported claim for 50% cancellation charge for last minute cancellation as testified by D1 can only fortify the fact that the defendants have treated the contract as terminated, and account for why D2 did not request the plaintiff to take delivery of the remaining 1,489 laptops and other devices under the contract.

[75] Based on the totality of the evidence, this court finds the contract has been terminated by consent of the plaintiff and D2 through D1, OR due to D2's fundamental breach or repudiatory breach, the plaintiff's termination of the whole contract, seek a refund of the purchase monies paid and look for alternative supply are justified – see *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 FC. D2's failure to deliver the laptops based on conditions and quality agreed would entitle a reasonable and commercially sensible buyer in the person of the plaintiff to take the position that the promised bargain as having little or no value at all. The Federal Court in *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464 stated as follows:

> [60] In fact in *Berjaya Times Square Sdn Bhd*, it did not rule as wrong the conclusions in the cases which allowed termination of the respective contracts on the ground that there was failure to complete the contractual works (see *Tan Yang Loong & Anor v. Newacres Sdn Bhd* [1992] 1 MLJ 289; *Chye Fook v. Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308; *Law Ngei Ung v. Tamansuri Sdn Bhd* [1989] 2 CLJ 44 (Rep); [1989] 2 CLJ 181). As such the principle should therefore be this. *There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there is a right to terminate the contract, but not in the latter instance.* (emphasis added)

[76] It follows that I find the plaintiff is entitled in the circumstances, to claim a refund of the sum of RM3,239,681.30 comprising monies paid for the 1,011 laptops, in the sum of RM1,259,706 at RM1,246 per laptop and the sum of RM1,979,975.30 paid for the 1,489 units of undelivered laptops.

[77] The plaintiff in submissions made clear that it is not seeking to claim for the higher costs (see pp. 246 to 248, 253 to 274 CBD2) it had incurred in procuring new laptops and devices from other vendors to continue with its obligations under the CERDIK initiative.

[78] In this court's judgment, it is also no answer to the plaintiff's claim for the defendants to assert that the plaintiff has failed to mitigate its losses as it was always open to the defendants themselves to undertake a verification exercise on the quantity and condition of the rejected laptops. Having refused to accept re-delivery of the rejected laptops and having not insisted that the plaintiff take delivery of the balance 1,489 units, the second defendant became the author of its own losses.

Whether D2 Was Unjustly Enriched?

[79] In *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, the Federal Court has recognised an independent cause of action in unjust enrichment. In that case, the Federal Court observed that

the foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment, which falls outside the domains of contract and tort.

[80] On principles of law, I see no reason to disagree with the plaintiff's counsel that the elements of unjust enrichment have been made out in this case. It is an agreed fact that the plaintiff had paid the sum of RM3,239,681.30 to D2. The sum was paid on a basis which in my view has failed – for the supply of laptops that are in accordance with the agreed specifications and/or of merchantable quality and/or fit for purposes of the CERDIK initiative. As such, it does appear to me that the first three ingredients alluded at [117] and [119] in *Dream Property* are satisfied *viz*: (i) D2 has been enriched, (ii) there was enrichment of D2 at the plaintiff's expense, (iii) the retention of the benefit by D2 was unjust, and (iv) I do not see any defence available to extinguish or reduce D2's liability to make full restitution of the amount paid by the plaintiff. Considering the matter from the wide-angle lens of justice, D2 will be enriched and it will be unconscionable or unjust to allow D2 to retain the moneys paid at the plaintiff's expense when D2 had disregarded with impunity the bargain struck with the plaintiff. D2 must return the money to the plaintiff for this failed transaction premised on the principle against unjust enrichment.

Whether D1 Is Personally Liable For The Tort Of Deceit And/Or Fraudulent Misrepresentation, And If So, What Is The Measure Of Damages?

[81] On what must be proven for the tort of *deceit*, the plaintiff's learned counsel helpfully pointed to the House of Lord's case of *William Derry, J. C. Wakefield, M. M. Moore, J. Pethick, And S. J. Wilde Appellants; And Sir Henry William Peek, Baronet Respondent.* (1889) 14 App. Cas. 337:

> In an action of deceit, the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

[82] The plaintiff's learned counsel drew attention to *Panatron Pte Ltd & Anor v. Lee Cheow Lee & Anor* [2001] 3 SLR 405 that the tort requires the plaintiff to prove that:

(i) there must be a representation of fact made by words or conduct;

(ii) the representation must be made with the intention that it should be acted upon by the plaintiff;

(iii) the plaintiff had acted upon the false statement;

(iv) the plaintiff suffered damage by so doing; and

(v) the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

[83] As to what is what is fraudulent misrepresentation, I refer to *ALW Car Workshop Sdn Bhd v. AXA Affin General Insurance Bhd* [2019] 7 CLJ 667; [2019] 4 MLJ 561 where the Federal Court explained fraudulent misrepresentation as follows:

> [46] On this point, we agree with the Court of Appeal in its findings, as stated in para. 33 of its judgment, that:
>
> Whether any particular claim is tainted with fraudulent intent is a question of fact to be inferred from the surrounding circumstances. Making a false statement in the belief that it is true constitutes misrepresentation. **However, making a false statement with the knowledge that it is false or not believing it to be true and the intention to deceive amounts to fraudulent misrepresentation.** The test of fraudulent misrepresentation as enunciated by the Privy Council in *Baron Akerheilm v. Rolf De Marc* [1959] AC 789 PC is as follows:
>
> > The question was not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, **but whether he honestly believed the representation to be true in the sense which he understood it *albeit* erroneously, when it was made.** (emphasis added)

[84] In this case, the nature of the representations made by the defendants to the plaintiff is said to be contained in paras. 11, 27 and 28 of the amended SOC which are alleged to be false. Thus, in my respectful view, the claim for misrepresentation may only be sustained in an action on the contract. In which case, s. 17 of the Contracts Act 1950 ("the Act") applies and it defines 'fraud' as follows:

> 'Fraud' includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contracts:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
>
> (b) the active concealment of a fact by one having knowledge or belief of the fact;
>
> (c) a promise made without any intention of performing it;
>
> (d) any other act fitted to deceive; and
>
> (e) any such act or omission as the law specially declares to be fraudulent.

[85] Looking at the pleading and based on documentary evidence and the oral testimony of witnesses, I find that there is a preponderance of evidence in the plaintiff's favour and that the plaintiff had proven its case on a balance of probabilities for deceit and/or fraudulent misrepresentation (with fraud as defined in s. 17 of the Act) within the principles of *ALW Car Workshop Sdn Bhd* and *Panatron*:

(i) The plaintiff did rely on the representations made by D1 and was induced into entering into contract with D2 when the plaintiff issued the purchase orders. These representations turned out to be false. In this regard, the plaintiff's internal memo dated 28 January 2021 at pp. 133 to 135 of CBD2 seeking approval to appoint D2 as the supplier for the 2,500 laptops contemporaneously set out the reasons for appointing D2 at the material time, even though the plaintiff had other suppliers to consider. It must be noted that the need of the laptops was pressing and urgent or critical at the relevant time, and D2, based on representations, was the only vendor who is able to supply 2,500 units of laptops within the requested time. I have no doubt at all that in truth, an honest man in the position of D1, could not in the whole of the existing circumstances has honestly believed that the defendants did have access to ready stocks of unused laptops that will meet the specifications for the purposes of supply to the plaintiff for the CERDIK initiative as borne out by the evidence, an excerpt of which reads:

KLKY: Sekarang, saya cross refer, ya, kepada muka surat 47, CBD3.

Dr Nizam: Ok.

KLKY: Ok. Dr?

Dr Nizam: Ya?

KLKY: Ini adalah perbualan di antara Dr Nizam dengan Dr Sulaiman, betul?

Dr Nizam: Betul.

KLKY: Ok, dan, ok, perbualan ini berlaku lebih kurang pada 02/02/2021, ya?

Dr Nizam: Betul.

KLKY: Ok, sekarang tengok muka surat 4. Ok, sebelum itu, Dr Sulaiman iaitu partner, ya? Partner atau rakan Dr Nizam untuk Yayasan Hasanah ini, ya.

Dr Nizam: Ya. Untuk projek ini.

KLKY: Betul?

Dr Nizam: Ya.

KLKY: Ok.

Dr Nizam: Betul.

KLKY: Ok, saya rujuk kepada muka surat 46, ya.

Dr Nizam: Ya.

KLKY: Ok, soalan saya, ini lebih kurang satu hari sebelum 02/02/2021, kan?

Dr Nizam: Betul.

KLKY: Ok.

Dr Nizam: Betul.

KLKY: Ok, berdasarkan kepada kandungan WhatsApp ini semua, ok, saya cadangkan setakat, ya, sebelum 02/02/2021, Dr Nizam dan Sigma masih belum finalise atau sahkan jumlah-jumlah laptop yang boleh ditempah daripada supplier-supplier lain, setuju?

Dr Nizam: Setuju. Tapi ...

KLKY: Tapi ini berlaku selepas Yayasan Hasanah memberi purchase order, ya, bertarikh 28/01/2021?

Dr Nizam: Betul.

KLKY: Saya rujuk Dr ke muka surat 48, CBD3 yang sama.

Dr Nizam: Ok.

KLKY: Nampak tak yang sebelah kanan itu, kotak sebelah kanan itu? "Tengah tunggu quotation Suren."

Dr Nizam: Yes.

KLKY: Ok, soalan saya, malah, ini adalah 02/02/2021, ya? Boleh ingat? Kalau tak, kita boleh scroll.

Dr Nizam: Boleh.

KLKY: Ok, lebih kurang, ini adalah sebelum 03/02/2021, ya, betul?

Dr Nizam: Betul.

KLKY: Iaitu 02/02/2021 lah, betul?

Dr Nizam: Ya.

KLKY: Ok. So, makna "Tengah tunggu quotation Suren" ini, maknanya Sigma masih belum finalise, ya, baki jumlah laptop dengan supplier-supplier Sigma, betul?

Dr Nizam: Tidak betul.

KLKY: Tak betul?

Dr Nizam: Ya, kerana –

KLKY: Maknanya sudah sahkan dan confirm dapat semua laptop daripada supplier-supplier Sigma?

Dr Nizam: Sebab kita ada bekalan backup punya supply lah. Kalau let's say yang ini tak berjaya, kita akan cari jugalah, sebab kita dah monitor.

KLKY: So, setakat sini, berapa jumlah laptop yang sudah dapat daripada supplier?

Dr Nizam: Daripada supplier? Kita sudah dapat lebih kurang 1,500.

KLKY: 1,500.

Dr Nizam: Ya.

KLKY: Berapa unit yang Yayasan Hasanah tempah?

Dr Nizam: 2,500.

KLKY: 2,500.

Dr Nizam: **So, kita kena dapatkan lagi 1,000 lah.** (emphasis added)

(ii) D2 was unable to supply unused laptops that meet the specifications required under the CERDIK initiative;

(iii) the laptops to be supplied will be defective but this was concealed from the plaintiff at the time of the contract, including pirated operating system in the laptops; the defendants' position being that the warranty was intended to be utilised to rectify any defect:

Dr Nizam: Kita tak nyatakan sebab di dalam pembekalan 1 IT, memang kita cover dengan any damages through warranty lah.

KLKY: Ok. Soalan saya seterusnya, ya.

Dr Nizam: Ok.

KLKY: **Dr Nizam ada bagi tahu bahawa mana-mana laptop yang akan dibekalkan akan mengandungi perisian OS yang cetak rompak.**

Ada bagi tahu tak?

Dr Nizam: Saya tidak beritahu seperti, sebegitu.

KLKY: Ok.

Dr Nizam: Ok.

KLKY: Dr Nizam, sebelum purchase order dimasukkan, Dr Nizam ada bagi tahu Yayasan bahawa laptop-laptop yang akan dibekalkan akan mengandungi calar atau retak pada badan laptop?

Dr Nizam: Ya, tapi –

KLKY: Ya ke tak ada?

Dr Nizam: Sekiranya berlaku, ianya akan cover dengan waranti lah.

KLKY: Tak, soalan saya ... Tak. Dr Nizam, untuk tujuan menyenangkan prosedur ini, tolong dengar soalan saya betul-betul.

Dr Nizam: Ok.

KLKY: Lepas itu jawab ya atau tidak sahaja.

Dr Nizam: Ok.

KLKY: Kalau ada apa-apa penjelasan, Dr boleh 1 buat semasa peguam Dr buat re-examination nanti, ya.

Dr Nizam: Ok.

KLKY: Alright. Seterusnya, sebelum purchase order dimasukkan, Dr Nizam ada bagi tahu Yayasan Hasanah bahawa laptop-laptop yang akan dibekalkan akan ada masalah bateri?

Dr Nizam: Yes, dengan waranti.

KLKY: Sebelum purchase order ini dimasukkan, Dr Nizam ada bagi tahu Yayasan Hasanah bahawa laptop-laptop yang akan dibekalkan akan ada power cord yang tidak sesuai?

Dr Nizam: Tidak. Yang itu tidak.

KLKY: Sebelum purchase order dimasukkan, Dr Nizam ada bagi tahu Yayasan Hasanah bahawa laptop-laptop yang akan dibekalkan akan ada disk bracket yang tidak sesuai?

Dr Nizam: Tidak.

KLKY: Sebelum purchase order dimasukkan, Dr Nizam ada bagi tahu Yayasan Hasanah bahawa laptop-laptop yang akan dibekalkan mungkin ada webcam yang tidak dipasangkan?

Dr Nizam: Ya, saya sudah beritahu.

KLKY: Dari segi waranti, ya, Dr Nizam?

Dr Nizam: Ya, sama juga. Waranti.

KLKY: Alright. Ok, sebelum purchase order dimasukkan, Dr Nizam ada bagi tahu Yayasan Hasanah bahawa laptop-laptop yang akan dibekalkan akan ada masalah webcam?

Dr Nizam: Tidak, saya tidak beritahu pasal benda ini.

KLKY: Sebelum purchase order dimasukkan, Dr Nizam ada bagi tahu Yayasan Hasanah bahawa laptop-laptop yang akan dibekalkan akan ada masalah bluetooth?

Dr Nizam: Tidak.

KLKY: Tidak, ya?

Dr Nizam: Tidak.

KLKY: Saya cadangkan bahawa Dr Nizam tidak bagi tahu semua isu-isu sebab Dr Nizam nak meyakinkan Yayasan Hasanah untuk membuat belian laptop-laptop terus daripada Sigma, iaitu Defendan Kedua. Setuju atau tidak setuju?

Dr Nizam: Tidak setuju.

KLKY: Saya cadangkan bahawa Dr Nizam tidak beritahu isu-isu tersebut kepada Yayasan Hasanah terlebih dahulu sebab Dr Nizam berniat menipu Yayasan Hasanah supaya membuat belian laptop-laptop buruk daripada Sigma. Setuju atau tidak setuju?

Dr Nizam: Tidak setuju.

KLKY: Ok, sekarang muka surat 196, ya, bundle yang sama. I'm sorry, My Lady, if I'm going too fast, My Lady please let me know, yes, because I can tend to go a bit fast.

Judge: When you go very fast and I can't catch it, then you will just have to rely on the notes, the transcript.

KLKY: Alright, My Lady. Very well, My Lady. I'll try to go slower, My Lady. Ok. Muka surat ini, ya, muka surat 196, CBD2. Ok, perenggan kedua. Ok, saya bacakan, ya. "Sigma informed YH that the production already started since Saturday, 30/01/2021, and so far, everything is on track." (emphasis added)

(iv) Collecting from the surrounding circumstances the materials which throw light on D1's state of mind, it can be ascertained and this court is left with the indelible impression that he had intentionally made false representations that D2 had ready stocks and is able to supply 2,500 units of laptops that meets the specifications required under the CERDIK initiative, and believing the representations to be true, the plaintiff did on 29 January 2021 itself paid a sum of RM1,401,750 representing 45% of the deposit for 2,500 laptops when the defendants as of 2 February 2021 were still looking for another 1,000 laptops as borne out by the evidence including the above excerpts at paras. 85.1 and 85.3;

(v) As a result of reliance on such representations, the plaintiff has suffered damage.

[86] Damages ought to be allowed after a finding of fraudulent misrepresentation. In *Kee Wah Soong v. Yap Boon Hwa And Another Appeal* [2018] 1 LNS 1284, the Court of Appeal held as follows:

> [85] We take note that the learned trial Judge had made findings of fact that the 2nd Plaintiff had committed fraudulent misrepresentation on the Defendant, but did not grant any damages in favour of the Defendant, although it was specifically prayed as an alternative relief in the counter claim. *Although we agree with the learned trial Judge's findings on the fraudulent misrepresentation, the learned trial Judge had erred in her refusal to grant damages for the same. Damages ought to be allowed after a finding of fraudulent misrepresentation* on the part of the 2nd Plaintiff. (emphasis added)

See also *Yap Boon Hwa v. Kee Wah Soong* [2019] 1 LNS 1157; [2020] 1 MLJ 37 at [10].

[87] The relevant principles governing the measure of damages for fraudulent misrepresentation are set out in the judgment of House of Lords in *Smith New Court Securities Ltd v. Citibank NA* [1996] 4 All ER 769 as follows:

(i) The measure of damages where a contract has been induced by fraudulent misrepresentation is reparation for all the actual damage directly flowing from (*ie*, caused by) entering into the transaction – p. 777;

(ii) The victim of the fraud is entitled to compensation for all the actual loss directly flowing from the transaction induced by the wrongdoer. This includes consequential loss – p. 792;

(iii) The plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants – p. 794.

[88] *Smith New Court* was referred to and approved by the Court of Appeal in the case of *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227; [2003] 3 MLJ 460.

[89] Applying the aforementioned principles, I am of the respectful view that the plaintiff ought to be put back to the position as if the breaches of contract or fraudulent misrepresentations never happened and the plaintiff ought to also be fully indemnified for all the losses flowing from the breaches and acts of fraudulent misrepresentation. The quantum of damages based on breaches and fraudulent misrepresentation would effectively be the same as the plaintiff's claim for breach of contract.

[90] Having found D1 personally liable for the tort of deceit and/or fraudulent misrepresentation, there is no necessity for me to deal with whether the corporate veil ought to be lifted.

Whether The Second Defendant Is Entitled To The Counterclaim?

[91] D2's counterclaim for special damages of a sum of RM36,000 as storage charges of the undelivered laptops for the period February 2021 to December 2021 arose out of the plaintiff's refusal to continue with the contract.

[92] D2 must show that these damages sustained is due to the breach of contract by the plaintiff in order to succeed in its counterclaim. On the contrary, I found it was D2 that was in breach of contract. Thus, the counter claim is untenable and falls.

[93] For reasons given, I held that the plaintiff had proved its claim on a balance of probabilities against both defendants. As such:

(i) Judgment is entered against D1 and D2 jointly and severally for the sum of RM3,239,681.30 with interest at 5% per annum as claimed, together with costs of RM35,000 subject to allocator. The plaintiff's storage charges are not allowed as the claim for storage charges is made under general damages which is pleaded as an alternative claim.

(ii) D2's counterclaim is dismissed.

[94] I should mention that I did not allow exemplary damages sought by the plaintiff as it has not shown that 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff' within the second category of claim of exemplary damages set out by Lord Devlin in *Rookes v. Barnard & Ors* [1964] AC 1129 at p. 1226.